2003

Dawn D. Colleli v. Ralph D. Colleli : Brief of Appellant

Utah Court of Appeals

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Michael A. Jensen; attorney for petitioner.

IN THE UTAH COURT OF APPEALS

DAWN D. COLLELI, Appellant/Petitioner, vs. **RALPH D. COLLELI,** Appellee/Respondent.	**BRIEF OF APPELLANT** **CASE NO. 20030666-CA** **Third District Court No. 014906500**

BRIEF OF APPELLANT

Appeal from the Third District Court, Judge Anthony B. Quinn

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ORAL ARGUMENT REQUESTED

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JURISDICTION OF THE COURT

Jurisdiction is conferred upon this Court by virtue of § 78-2a-3(2)(j), *U.C.A.*

ISSUES PRESENTED FOR REVIEW and STANDARD OF REVIEW

Issue No. 1: Whether the trial court erred in awarding Appellant only $3,000 in attorney fees instead of $11,377 as requested by Appellant and supported by affidavit and detailed billing records, and which requested amount did not include time spent at trial and on post-trial proceedings. This issue was part of a final order of the trial court and appealable as a matter of right as provided by Rules 3 and 4 of *Utah R. App. P.*

Standard of Review: The amount and reasonableness of a trial court's award of attorney fees is ordinarily a question of law with some measure of discretion given to the trial court in applying the reasonableness standard to a given set of facts, *i.e.*, it is a mixed question of law and fact. *See Salmon v. Davis County*, 916 P.2d 890, 892 (Utah 1996); *State v. Pena*, 869 P.2d 932, 939 (Utah 1994); *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 268 (Utah 1992); *Dixie State Bank v. Bracken*, 764 P.2d 985, 988 (Utah 1988).

However, the sufficiency of a trial court's findings that support an award of attorney fees is reviewed under a correction-of-error standard. *See Anderson v. Doms*, 1999 UT App 207 ¶9. Although trial courts are normally afforded broad discretion in determining what constitutes a reasonable fee, such an award "must be based on the

evidence and supported by findings of fact." *See id.*; *Salmon v. Davis County*, 916 P.2d 890, 893 (Utah 1996).

Issue No. 2: Whether the trial court erred in concluding that a Nevada order that changed the child support obligation of the parties was ambiguous on the question of whether the order also eliminated a previous award of alimony in favor of Appellant/Petitioner. This issue was part of a final order of the trial court and appealable as a matter of right as provided by Rules 3 and 4 of *Utah R. App. P.*

Standard of Review: The trial court's interpretation of a prior judicial order constitutes a conclusion of law. *See Billings v. Union Bankers Ins. Co., 918 P.2d 461, 464 (Utah 1996); State v. Montoya*, 887 P.2d 857, 858 (Utah 1994). Also, whether a writing is ambiguous or not is a conclusion of law. *See e.g., Jeffs v. Stubbs*, 970 P.2d 1234, 1251 (Utah 1998); *Alf v. State Farm Fire & Cas.*, 850 P.2d 1272, 1274 (Utah 1993). A conclusion of law is reviewed under the correction of error standard with no particular deference given to the trial court's ruling. *See S.S. v. State*, 972 P.2d 439, 440-41 (Utah 1998); *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998).

Issue No. 3: Whether the trial court erred in concluding as a matter of law that Appellant's/Petitioner's failure to previously request unpaid alimony bars her from seeking reimbursement for such unpaid alimony. This issue was part of a final order of the trial court and appealable as a matter of right as provided by Rules 3 and 4 of *Utah R. App. P.*

Standard of Review: Where no statute of limitations barred the collection of unpaid alimony, the trial court's application of the doctrine of laches (without explicitly stating so) constitutes a conclusion of law. *See Anderson v. Doms*, 1999 UT App 207. Also, whether a statute of limitations has expired constitutes a conclusion of law. *See Estates v. Tibbs*, 979 P.2d 823, 824 (Utah 1999); *Kessimakis v. Kessimakis*, 977 P.2d 1226, 1228 (Utah Ct. App. 1999). A conclusion of law is reviewed under the correction of error standard with no particular deference given to the trial court's ruling. *See S.S. v. State*, 972 P.2d 439, 440-41 (Utah 1998); *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998).

Issue No. 4: Whether the trial court erred when it concluded that the provisions of § 78-45-7.15(8), *U.C.A.*, are not applicable to a Nevada decree of divorce, even though Appellee/Respondent first sought jurisdiction in the State of Utah by registering the foreign decree and then sought to enforce the decree against Appellant/Petitioner for one half of the medical bills paid by him. This issue was part of a final order of the trial court and appealable as a matter of right as provided by Rules 3 and 4 of *Utah R. App. P.*

Standard of Review: The trial court's choice of law constitutes a conclusion of law. *See Wilde v. Wilde*, 969 P.2d 438, 442 (Utah Ct. App. 1998); *Shaw v. Layton Constr. Co.*, 872 P.2d 1059, 1061 (Utah Ct. App. 1994). A conclusion of law is reviewed under the correction of error standard with no particular deference given to the trial court's ruling. *See S.S. v. State*, 972 P.2d 439, 440-41 (Utah 1998); *Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998).

RELEVANT STATUTES

§§ 30-3-3(1) and 30-3-5(6), *U.C.A.* (2002)[1]

§ 30-3-3. Award of costs, attorney and witness fees.

(1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. The order may include provision for costs of the action.

§ 30-3-5. . . . Custody and parent-time . . .

(6) If a petition alleges substantial noncompliance with a parent-time order by a parent, or a visitation order by a grandparent or other member of the immediate family pursuant to Section 78-32-12.2 where a visitation or parent-time right has been previously granted by the court, the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

§§ 78-45-7.15(8) and (9), *U.C.A.*

(8) A parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment.

(9) In addition to any other sanctions provided by the court, a parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if that parent fails to comply with Subsections (7) and (8).

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[1] § 30-3-5 was amended effective May 5, 2003 to add subsection (4), which caused the renumbering of subsection (6) as subsection (7). Since the subject trial and judgment were prior to May 5, 2003, the relevant subsection is herein referred to as subsection (6).

Uniform Interstate Family Support Act
"UIFSA"

§ 78-45f-101. Definitions.

In this chapter:

(16) "Responding state" means a state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating state under this chapter or a law or procedure substantially similar to this chapter, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(17) "Responding tribunal" means the authorized tribunal in a responding state.

(21) "Support order" means a judgment, decree, or order, whether temporary, final, or subject to modification, for the benefit of a child, a spouse, or a former spouse, which provides for monetary support, health care, arrearages, or reimbursement, and may include related costs and fees, interest, income withholding, attorney's fees, and other relief.

§ 78-45f-102. Tribunal of state.

The district court and the Department of Human Services are the tribunals of this state.

§ 78-45f-303. Application of law of state.

Except as otherwise provided by this chapter, a responding tribunal of this state shall:

(1) apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings; and

(2) determine the duty of support and the amount payable in accordance with the law and support guidelines of this state.

STATEMENT OF THE CASE

Introduction and Background:

In 1987, the parties were married in the State of Utah. In 1997, the parties were divorced in the State of Nevada. There are two minor children from this marriage. The parties and their children have resided in the State of Utah since at least 2001.

After the parties were married, Ms. Colleli was diagnosed with Multiple Sclerosis ("MS") and has not been gainfully employed since approximately 1989. She was determined to be permanently disabled by the Social Security Administration, and she requires the aid of a wheelchair for her general movement. Ms. Colleli resides in an assisted living facility and is financially supported by SSI and Medicaid. She has no access to a vehicle and she cannot drive a vehicle even if she had access to one.

The initial Nevada divorce decree awarded alimony and custody of the children to Ms. Colleli. The Nevada Court modified the decree twice, transferring custody of the children to Mr. Colleli and modifying the amount of alimony to be paid by him.

After Ms. Colleli returned to Utah and while she was residing in a long term care facility, she requested that Mr. Colleli bring the children to the care facility for parenting time. Mr. Colleli refused. Ms. Colleli first requested legal help from the Legal Aid Society of Salt Lake, but her request was denied. Another resident at the care facility befriended Ms. Colleli and he requested his attorney to help her obtain statutory parenting time with her two children. That request led to Ms. Colleli's present counsel, who represented Ms. Colleli throughout all proceedings in the trial court and this appeal.

After retaining counsel, Ms. Colleli qualified under Medicaid's FlexCare Program and was transferred to Regent's Assisted Living facility (now Wentworth Assisted Living), a relatively new facility in Midvale, Utah. It is at this residence where parenting time takes place and where the children's transportation to and from is required.

Nature of the Case, Course of Proceedings, and Disposition:

During all proceedings in the trial court the parties and their two minor children resided in Utah. As will be addressed in greater detail below, the foreign Nevada decree, Ms. Colleli's indigence, Ms. Colleli's disability, and Mr. Colleli's intransigence on the issue of transportation complicated and prolonged the proceedings in the trial court.

This appeal arises from post-divorce matters concerning (1) Mr. Colleli's refusal to provide parenting time and the associated transportation for the minor children to realize such parenting time; (2) unpaid alimony by Mr. Colleli; and (3) Ms. Colleli's unpaid medical expenses for the minor children.

Ms. Colleli, filed in November 2001 a petition to modify the decree of divorce to (1) permit her to have statutory parenting time with her two minor children; and (2) reduce the amount of child support to the minimum allowed by Utah law. After a year of motions, hearings, mediation, and discovery, a trial was held in January 2003. Ms. Colleli prevailed on all issues. Judgment was entered against Mr. Colleli. The judgment ordered Mr. Colleli to permit statutory parenting time and to provide the necessary transportation for the minor children during parenting time. The judgment also reduced Ms. Colleli's monthly child support payments to $20, the minimum allowed by

Utah Law. The judgment also included an award of attorney fees to Ms. Colleli. Awarding such a small fraction of her fees gave rise to the First Issue herein.

Very early in the proceedings and nearly a year before trial, Ms. Colleli filed a Motion for an Order to Show Cause against Mr. Colleli for unpaid alimony. Ms. Colleli's motion was denied based on the trial court's interpretation of a Nevada order and also based on the trial court's application of the doctrine of laches. The denial of her motion gave rise to the Second and Third Issues herein.

Shortly after trial and six days after Ms. Colleli began collecting the judgment entered in her favor, Mr. Colleli filed a Motion for an Order to Show Cause against Ms. Colleli for one-half of the children's medical bills that he allegedly paid from 1999 through February 2003. Although Mr. Colleli failed to provide to Ms. Colleli any prior written verification as required by § 78-45-7.15(8), *U.C.A.*, the trial court entered judgment against Ms. Colleli. The trial court ruled that § 78-45-7.15(8), *U.C.A.*, was not applicable, since the divorce decree was entered by a Nevada court and did not include the requirements of § 78-45-7.15(8), *U.C.A.* Granting Mr. Colleli's motion and entering judgment against Ms. Colleli gave rise to the Fourth Issue herein.

Statement of Facts Relevant to Issues Presented:

The two issues raised in Ms. Colleli's petition were narrow but substantially important: (a) statutory parenting time; and (b) the amount of child support. However, the path to trial and judgment was unexpectedly tortuous, lengthy, and expensive. Since the trial court entered judgment in favor of Ms. Colleli on both issues, those issues are not

challenged on appeal. Rather, Ms. Colleli's appeal primarily focuses on the trial court's substantial reduction of Ms. Colleli's requested attorney fees.[2]

The relevant facts underlying the reasonableness of attorney fees are the procedural aspects of the trial court case and what or who caused the litigation to be prolonged. It is precisely those facts that necessarily form the basis of any award of attorney fees.

The trial court admitted that it did not review those procedural facts or any billing records prior to expressing an opinion on the amount of attorney fees to be awarded. (R. at 620/Trial Tr. at 58)(A-1).[3] Rather, the trial court opined that $3,000 was a reasonable amount to resolve the issues raised in Ms. Colleli's petition. *Id.* Ms. Colleli contends that such facts could not reasonably lead to the substantial reduction of fees entered by the trial court. Accordingly, those facts are recited herein in great detail.

On October 4 and 16, 2001, Ms. Colleli first sent letters to Mr. Colleli for the purpose of requesting statutory visitation. (R. at 325-26); *see also*, (R. at 620/Trial Tr. at 9-10)(A-1). On October 29, 2001, counsel for Ms. Colleli also sent a letter to Mr. Colleli requesting statutory visitation. (R. at 327).

On November 1, 2001, Mr. Colleli filed or caused to be filed an authenticated copy of an Nevada Order that modified the original divorce decree. (R. at 1-5)(A-12). Since

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[2] In addition, other orders entered prior to and subsequent to trial were timely added to Ms. Colleli's appeal. These orders give rise to Issues 2, 3 and 4 herein.

[3] Those citations that reference documents that are also included as an Addendum to this Brief, the form "(A-nn)" will be used where "nn" is the number of the Addendum where such document can also be found.

Mr. Colleli refused Ms. Colleli's request for visitation, she filed on November 13, 2001 a Verified Petition to Modify Decree. (R. at 6-16).

On the same day, November 13, 2001, Ms. Colleli also filed a Motion for Temporary Order and Appointment of Guardian ad Litem. (R. at 17-20). On December 3, 2001, the parties appeared before the Commissioner for hearing on Ms. Colleli's Motion for Temporary Order and Appointment of Guardian ad Litem. (R. at 23-24). Mr. Colleli was not at that time represented by counsel.[4] *Id.*

The Commissioner's Minute Entry ordered parenting time to commence, although such parenting time was limited because of Ms. Colleli's then living accommodations.[5] *Id.* The Commissioner also ordered the parties to use mediation to resolve any further disputes over parenting time. *Id.*

The Temporary Order was prepared by Ms. Colleli's counsel. It was first submitted to Mr. Colleli's counsel for approval. No objections were filed.[6] On January 9, 2002, the Order was entered by the trial court. (R. at 80). The Order also required Mr. Colleli to provide transportation for the minor children. (R. at 81).

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[4] It is not known exactly when Mr. Colleli retained counsel, but he had counsel as early as December 18, 2001, since he was represented by counsel at a hearing on that date. (R. 40).

[5] At that time, Ms. Colleli was residing in a long-term care facility and could not reasonably accommodate overnight visits by her two children.

[6] No citation to the Record is required, since the Record contains nothing to suggest that an objection to the Temporary Order was filed by Mr. Colleli or his counsel. However, the Record shows that Mr. Colleli's counsel was served on December 18, 2001 with a copy of the proposed Temporary Order. (R. 82-83)

On January 16, 2002, a Certificate of Default was entered against Mr. Colleli. (R. at 88). Six days later on January 22, 2002, Mr. Colleli, by and through counsel, filed an Answer to Ms. Colleli's Petition. (R. at 89).

On February 27, 2002, the parties attended mediation. (R. at 115, 599).[7] Since Ms. Colleli is indigent and disabled, she can not provide transportation. (R. at 198). After mediation, the transportation issue remained. (R. at 115); (R. at 620/Trial Tr. at 44)(A-1).

When mediation failed to resolve the issue of transportation, Mr. Colleli formally objected to being responsible for transportation of the children by filing a Motion to Set Aside [the Temporary] Order and Default. (R. 124). At a hearing on April 18, 2002, the Commissioner entered a Minute Entry that set aside Mr. Colleli's Default and the provision in the Temporary Order that required Mr. Colleli to provide transportation for the children. (R. at 162). The Commissioner also recommended that a Guardian ad Litem be appointed for the children. *Id.* Shortly thereafter, on April 30, 2002, the Guardian ad Litem entered his appearance. (R. at 164).

After mediation failed to resolve the issue of transportation, and after Mr. Colleli filed his Rule 60(b) Motion to set aside, Ms. Colleli commenced discovery by issuing to Mr. Colleli various interrogatories and requests for documents and admissions.

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[7] The Certificate shows that mediation was set for February 27, 2002, and the box entitled "partial agreement reach" is checked. (R. at 115) However, the trial court's docket shows an entry on March 7, 2002: "partial agreement reached (transportation no resolved)" (R. at 599) Also, the date shown in the docket incorrectly states the date of the referral to mediation and not the actual date of mediation. *Id.*; (R. at 115)

(R. at 144). When the Commissioner removed from the Temporary Order Mr. Colleli's duty to provide transportation, Ms. Colleli filed her Notice to depose Mr. Colleli on May 14, 2002. (R. at 153)(R. at 337-58)(A-9).

The deposition of Mr. Colleli was particularly difficult. Mr. Colleli was evasive, untruthful, and asserted that he had no knowledge of numerous facts. *See, e.g.*, (R. at 348-51, 353-55)(A-9).

On June 5, 2002, the Guardian ad Litem submitted his Report and Recommendation. (R. at 196-99). His report recommended that statutory parenting time be permitted and that Mr. Colleli provide the necessary transportation for the minor children. (R. at 198).

Five days later, on June 12, 2002, Mr. Colleli filed his Financial Declaration and "Proposed Settlement" in support of his Certificate of Readiness for Trial. (R. at 203-09)(A-11). Under the heading of "Visitation," Mr. Colleli wrote the following:

> "Once a week 2-3 hrs, every other weekend, Dawn [Ms. Colleli] to provide (including bus pass transportation)"
>
> (R. at 209)(A-11).

On August 6, 2002, a pretrial settlement conference was held with the Commissioner. (R. at 222). At the settlement conference, there was no resolution of the transportation issue and no resolution of attorney fees.[8] *Id.*

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[8] Through the date of the pre-trial settlement conference with the Commissioner, Ms. Colleli's legal fees were $7,843. (R. at 271-80). At the settlement conference, Mr. Colleli offered to pay a mere $900 toward Ms. Colleli's attorney fees, and he maintained that offer through the date of trial. (R. at 620/Trail Tr. at 67); (R. at 297)

On December 23, 2002, a pretrial conference was held with the trial court. (R. at 232). The trial court ordered a bench trial be set for January 14, 2003; that witness lists be submitted by January 3, 2003; and that proposed findings of fact and conclusions of law be submitted by January 10, 2003. *Id.* Ms. Colleli filed her Designation of Witnesses, (R. at 233), and her Proposed Findings of Fact and Conclusions of Law. (R. at 260). Ms. Colleli also submitted an 11-page Trial Brief, but it is not in the Record.

At the pretrial conference, Mr. Colleli's regular counsel, Steven Russell, was not present. (R. at 620/Trial Tr. at 45)(A-1). Rather, Mr. Smith had substituted for Mr. Russell that day. *Id.* The substitution of counsel likely led to some uncertainty as to whether or not Mr. Colleli had agreed to provide transportation for the children.

The Trial Transcript, dated January 14, 2003, and the Hearing Transcript, dated March 31, 2003, provide answers to the question of when Mr. Colleli agreed to be responsible for transportation.[9] The trial court concluded that the issue of transportation remained unresolved until the day of trial. Specifically, Judge Anthony Quinn presided at the trial and at the Rule 59 hearing. After testimony was taken, Judge Quinn stated:

> "The position at the pretrial conference we had in this case . . . you weren't there, Mr. Russell, but Mr. Smith was there. . . . "He indicated that that was still an outstanding issue, the transportation."
>
> (R. at 620/Trial Tr. at 45)(A-1).

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[9] Two transcripts were prepared: one for the trial on January 14, 2003 and one for a hearing held on March 31, 2003. To conveniently distinguish herein between the two transcripts, the notations "Trial Transcript" or "Trial Tr." and "Hearing Transcript" or "Hearing Tr" are used. The Complete transcripts are attached hereto as Addenda 1 and 2.

> "I'll take judicial notice of the fact that at the time of the pretrial conference in this case I was informed by both sides that the issue of who would be responsible for transportation was still an open issue."
>
> (R. at 620/Trial Tr. at 45-6)(A-1).
>
> "I was vague at that pretrial conference – the final pretrial conference of whether [the transportation issue] was still an open issue. I came away with the impression that it was still an open issue, and I've given considerable thought to that issue since the time of the pretrial conference."
>
> (R. at 620/Trial Tr. at 56)(A-1).

At the subsequent hearing on Ms. Colleli's Rule 59 Motion, Judge Quinn also stated the following:[10]

> "I agree with you that we did not have an unequivocal agreement at [the pretrial conference] that the [Mr. Colleli] would provide transportation."
>
> (R. at 621/Hearing Tr. at 14)(A-2).

At the beginning of trial, held on January 14, 2003, Mr. Colleli agreed to fully comply with the Guardian ad Litem's recommendations, including providing transportation for the minor children during parenting time with Ms. Colleli. (R. at 620/Trial Tr. at 3)(A-1). That left only the issue of attorney fees. Specifically, whether attorney fees be awarded and in what amount. (R. at 620/Trial Tr. at 4)(A-1).

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[10] On February 20, 2003, Ms. Colleli filed a Rule 59 Motion to Open Judgment and Amend Findings of Fact and Conclusions of Law. A hearing was held on March 31, 2003, at which Judge Quinn presided. A Hearing Transcript was prepared and is part of the Record. The Hearing Transcript is also included herein as Addendum 2.

Consistent with the three-pronged analysis set forth in *Muir v. Muir*, 841 P.2d 736 (Utah Ct. App. 1992), the trial began by first obtaining evidence to answer (1) whether Ms. Colleli was in need of financial assistance; and (2) whether Respondent had the ability to pay her fees. Two witnesses offered testimony: Ms. Colleli and Mr. Colleli. (R. at 620/Trial Tr. at 2)(A-1).

The trial court found that Ms. Colleli was in need of financial assistance and that Mr. Colleli had the means to pay her attorney fees. (R. at 298-99)(A-3). However, the trial court found the attorney fees to be "excessive given the limited assets of the parties, the narrow issues in the case and the results obtained." (R. at 299)(A-3).

Prior to trial, Ms. Colleli's attorney fees were $11,377. (R. at 267-85). At the conclusion of the trial, Judge Quinn, without a review of the affidavit of fees or billing records submitted by Ms. Colleli's counsel,[11] opined that $3,000 was a reasonable amount for attorney fees. (R. at 620/Trial Tr. at 58)(A-1).

The trial court stated:

> I could go through and look at individual entries and try and determine what fees were reasonably expended and what fees were not reasonably expended, and I'm happy to do that if you think that's an appropriate exercise.
>
> But it's my view that something around $3,000 is an amount that would be reasonably necessary to prosecute the actual issues involved in this case.
>
> (R. at 620/Trial Tr. at 58)(A-1).

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[11] Ms. Colleli's counsel submitted at the beginning of trial his affidavit of fees with detailed billings records. (R. at 267-285).

Judge Quinn relied on an extract of Mr. Colleli's deposition that was never entered as evidence nor filed with the trial court. (R. at 620/Trial Tr. at 57)(A-1). Judge Quinn stated that he only quickly reviewed it during the trial. *Id.* The document relied on by the trial court (the "Extract") was prepared solely to impeach Mr. Colleli during his examination at trial. The Extract was never marked as an exhibit nor submitted to nor filed with the trial court prior to or during trial.[12]

Counsel for Ms. Colleli tried on multiple occasions to correct the misunderstanding that Judge Quinn had about the Extract. (R. at 311), (R. at 621/Hearing Tr. at 6-7)(A-2). But Judge Quinn continued to insist that he had the full deposition and that he had reviewed all of its pages. (R. at 621/Hearing Tr. at 7)(A-2). However, there is no such other copy of the deposition anywhere in the Record. In response, Judge Quinn stated:

> "Well, one [deposition] was submitted to me is sequential from page one to the end of the deposition with no pages omitted."
>
> (R. at 621/Hearing Tr. at 7)(A-2).

After trial, counsel for Ms. Colleli prepared and submitted findings of fact and conclusions of law. (R. at 287-92). Counsel for Mr. Colleli approved them as to form. *Id.* Notwithstanding approval by counsel for both parties, the trial court elected to draft and enter its own findings and conclusions. (R. at 296-300)(A-3).

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[12] As evidence of this fact, the Extract is filed in the Record in chronological order of the deposition, May 14, 2002. (R. at 179-195)(A-10). The Extract is not marked as an exhibit, nor filed in the Record on or near the date of trial, nor attached to any motion or pleading. The only complete copy of the deposition is the one attached as Exhibit D to Ms. Colleli's Memorandum in Support of her Rule 59 Motion. (R. at 337-58)(A-9).

In its findings, the trial court found that 90% of Mr. Colleli's deposition was devoted to "exploring Mr. Colleli's financial condition, which was only relevant to the issue of attorney's fees." (R. at 300). However, a careful review of the complete deposition shows that questions about Mr. Colleli's financial condition first begin on page 44, and there are only 82 pages of questions and answers. (R. at 337-58)(A-9).

SUMMARY OF ARGUMENT

Issue No. 1:

The trial court erred when it reduced Ms. Colleli's requested attorney fees from $11,377 to $3,000, because the facts can not reasonably lead to such a reduction of fees. The trial court acted arbitrarily and without analysis when it first opined that the amount of fees should be $3,000, and it admitted that it had not reviewed the billing records.

Second, the trial court's findings are insufficient and contrary to the evidence in the record. From 15 pages of billing records, the trial court cited only one entry that it considered to be unnecessary or wasteful, and it failed to consider the conduct of Mr. Colleli. But for his actions, the substantive issues could have been resolved quickly.

Third, the trial court's findings on when the transportation issue was resolved are internally inconsistent. Findings No. 6, 8 and 22 purportedly answer that issue. Only Finding No. 8 is correct because it is supported by several statements made by the trial court during and subsequent to trial. There is no evidence to support the trial court's Findings 6 and 22, and which are intended solely to support a reduction of fees.

Fourth, the trial court's findings about the deposition of Mr. Colleli are analytically flawed, erroneous, and unsupported by the record. Even a cursory examination of either the complete deposition or the Extract shows that the trial court's analysis and conclusions about the deposition's content are clearly erroneous.

Fifth, the trial court improperly discounted the amount of time expended to discover Mr. Colleli's financial condition, although Ms. Colleli had a duty to show that Mr. Colleli had the financial means to pay her attorney fees.

Sixth, the trial court erred when it limited Ms. Colleli's fees based on the number of and narrowness of the issues. This is contrary to Utah Law. Limiting fees based on the amount or extent of the controversy is inappropriate without a consideration of which party caused the protracted proceedings.

Seventh, the issue of transportation was not amicably resolved prior to trial because of Mr. Colleli's intransigence. The trial court admitted that it did not know why the parties did not get together sooner. The trial court overlooked the fact that the parties attended mediation within a few weeks of the first hearing. The trial court failed to make even a basic inquiry into which party caused the proceedings to be more extensive than they might otherwise have been. Had it done so, it would have readily observed that Mr. Colleli was the sole impediment to resolving the issues.

Eighth, the trial court's reduction of fees is contrary to law and public policy. Utah's divorce laws are intended to provide attorney fees to the prevailing party and to deter bad conduct. Ms. Colleli had and has no financial means to retain an attorney. Any attorney

that helps her should be able to rely on Utah's Statutes to receive compensation by way of an award of attorney fees. Otherwise, Ms. Colleli would never in the future be able to retain counsel to vindicate her rights.

Issue No. 2:

The trial court denied Ms. Colleli's attempt to collect unpaid alimony. The basis for the request is a Nevada Divorce Decree and a subsequent "February Order" that modified the manner of calculating the amount of alimony. The trial court found ambiguity in a subsequent Nevada order (the "May Order"). Because of that ambiguity, the trial court ruled that the May Order eliminated alimony. While the May Order changed custody and child support obligations of the parties, it was entirely void of any mention of alimony. It was captioned as "Child Custody" and dealt exclusively with custody and the corresponding obligation for child support. The trial court somehow linked the need for child support with the need for alimony, but there is no basis in law for such connection.

Issue No. 3:

In addition to finding ambiguity in the May Order, the trial court also applied the doctrine of laches. It denied Ms. Colleli's Motion for Order to Show Cause because she failed in the two and one-half years since the entry of the February Order to make a demand for such alimony. The doctrine of laches is clearly not appropriate under Utah Law and Utah Case Law supports a reversal of the trial court's denial.

Issue No. 4:

Almost immediately after Ms. Colleli garnished Mr. Colleli's bank account to enforce the judgment entered against him, he filed a Motion for Order to Show Cause to obtain judgment against her for one-half of the medical bills that he allegedly paid from 1999 through February 2003. During that period of time, Mr. Colleli failed entirely to provide timely written verification of such bills as required by § 78-45-7.15(8), *U.C.A.* However, the trial court refused to apply § 78-45-7.15(8), *U.C.A.*, because the Nevada Decree did not contain the provisions included within § 78-45-7.15(8), *U.C.A.*

Since the trial court ignored UIFSA ("Uniform Interstate Family Support Act"), particularly § 78-45f-303, *U.C.A.*, which requires the trial court to apply Utah Law for any support order, including an order for medical bills, the trial court erred and its order should be reversed.

ARGUMENT

ISSUE NO. 1:

> *Whether the trial court erred in awarding Ms. Colleli only $3,000 in attorney fees instead of $11,377 as requested by her and supported by affidavit and detailed billing records, and which requested amount did not include time spent at trial and on post-trial proceedings.*

Ms. Colleli is aware that she must marshal all of the evidence in the record that could possibly support the trial court's reduction of attorney fees. In doing so, she will show that (1) the trial court arbitrarily arrived at the amount of fees; (2) the trial court failed to reasonably examine the record in formulating its findings of fact; and (3) had the trial

court reasonably examined the record, the evidence therein could not reasonably lead to such a substantial reduction of fees.

As a threshold matter, the basis for an award of attorney fees lies in Utah's Divorce Statutes: §§ 30-3-3(1) and 30-3-5(6), *U.C.A.*, (collectively the "Statutes"). The Statutes provide:

> (1) In any action filed under Title 30, Chapter 3, 4, or 6, and in any action to establish an order of custody, parent-time, child support, alimony, . . . , the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees, of the other party to enable the other party to prosecute or defend the action. . . .
>
> (6) If a petition alleges substantial noncompliance with a parent-time order by a parent, . . . the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party because of the other party's failure to provide or exercise court-ordered visitation or parent-time.

The trial court erred when it reduced Ms. Colleli's requested attorney fees from $11,377 to $3,000, because the facts can not reasonably lead to such a substantial reduction of fees.

Ms. Colleli prevailed in every aspect of her petition. On the day of trial, Mr. Colleli finally agreed to provide the necessary transportation for the minor children's visits with Ms. Colleli. (R. at 620/Trial Tr. at 3)(A-1). Upon his stipulation, the only remaining issue for trial was whether attorney fees should be awarded to Ms. Colleli, and if so, in what amount. (R. at 620/Trial Tr. at 4)(A-1).

A. <u>The trial court acted arbitrarily and without analysis:</u>

At the conclusion of testimony at trial, the trial court stated:

> I could go through and look at individual entries and try and determine what fees were reasonably expended and what fees were not reasonably expended, and I'm happy to do that if you think that's an appropriate exercise.
>
> But it's my view that something around $3,000 is an amount that would be reasonably necessary to prosecute the actual issues involved in this case.
>
> (R. at 620/Trial Tr. at 58)(A-1).

The trial court acted arbitrarily when it reached into thin air and picked a nice sounding number like $3,000 as the amount of fees that should be awarded. *Id.* The trial court failed to perform any analysis or review the affidavit of fees submitted to it prior to announcing the amount to be awarded. *Id.* Although the findings of the trial court indicate that it eventually reviewed the details of the affidavit of fees, the trial court did not modify by one penny the initial award derived from its visceral conclusion. Except for the deposition of Mr. Colleli, the trial court made no effort to identify legal activities were unnecessary, wasteful, or unreasonable. (R. at 299-300).[13]

Although trial courts are normally afforded broad discretion in determining what constitutes a reasonable fee, such award "must be based on the evidence and supported by findings of fact." *See Salmon v. Davis County*, 916 P.2d 890, 893 (Utah 1996). In the

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[13] Later, the trial stated in its Findings that it had "reviewed every entry on the Affidavit of Attorney's Fees submitted by [Ms. Colleli]".

instant case, the trial court appears to have taken a visceral approach in determining the amount of attorney fees. Rather than deriving an amount of fees from an analysis of the work performed, the trial court first set the amount of fees to be awarded and then proceeded to justify that amount. The record clearly supports the sequence of the Court's actions with respect to the amount of fees. After arbitrarily stating in open court an amount of $3,000, the trial court then drafted its own findings to support such amount.[14]

B. <u>The trial court failed to consider the conduct of Mr. Colleli and his attorney.</u>

In determining the reasonableness of attorney fees, the trial court never once examined or questioned the conduct of Mr. Colleli or his attorney nor did it consider Mr. Colleli's intransigence on the issue of transportation. Moreover, the trial court failed to examine the root cause of the extensive litigation. Had it done so, it would have found that the actions and conduct of Mr. Colleli and his attorneys were the major causes. But for their actions and intransigence on the issue of transportation, the matter could have been resolved with the trial court's intervention in a few weeks or a few months at most.

In cases where attorney fees are substantially increased by one party's conduct and motions, the prevailing party's request for attorney fees should not necessarily be limited by the simplicity of the issues or claims. *See Dixie State Bank v. Bracken*, 764 P.2d 985

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[14] After reviewing the proposed findings of fact and conclusions of law that were submitted to it and which were agreed by counsel for both parties, the trial court took it upon itself to draft new findings of fact and conclusions of law that in large part were intended to support its reduction of attorney fees. (R. at 296-300) (A-3)

("The attorney fees incurred by the [plaintiff] were clearly much higher than they should have been in this case, but they were higher because of the inconsistent and unmeritorious positions taken by the [defendant]—not because of any extravagance or 'overkill' on the [plaintiff's] part").

Had the trial court reasonably examined the actions of Mr. Colleli and his attorneys, it would have observed the following:

1. After mediation, Mr. Colleli refused to accept responsibility for the transportation of the minor children. (R. at 115); (R. at 620/Trial Tr. at 14, 44)(A-1).

2. Mr. Colleli and his attorney filed a Rule 60(b) Motion to set aside that part of the Temporary Order that required Mr. Colleli to be responsible for transportation of the minor children. (R. at 124); (R. at 620/Trial Tr. at 14)(A-1).

3. At his deposition on May 14, 2002, Mr. Colleli still refused to accept responsibility for transportation. (R. at 348)(A-9).

4. After the Guardian ad Litem's Report and Recommendations, Mr. Colleli submitted to the Commissioner his proposal for settlement. (R. at 209)(A-11) In his proposal, Mr. Colleli again refused to accept responsibility for the transportation of the minor children. *Id.*

5. At both the pretrial settlement conference with the Commissioner in August 2002 and the pretrial conference with the trial court in December 2002,

transportation of the minor children remained an issue for trial. (R. at 620/Trial Tr. at 45-46, 52-53)(A-1).

At each stage of the litigation listed above, the substantive issue of transportation remained unresolved. In effect, Mr. Colleli steadfastly refused to accept responsibility for such transportation. Not until the day of trial did Mr. Colleli clearly agree to be responsible for transportation. Had he accepted responsibility earlier, the litigation would have been substantially shortened. And with shortened litigation, the amount of attorney fees would have been substantially less than they were.

C. <u>The trial court's findings are internally inconsistent:</u>

On January 28, 2003, the trial court entered findings of fact. (R. at 296-300)(A-3). Finding No. 8 states:

> "<u>Just before this case went to trial</u>, the parties reached a stipulation on the substantive issues in the case and the trial proceeded only with respect to the issue of attorney fees."
>
> (R. at 297)(*emphasis added*).

However, to support its rationale for reducing the amount of fees, the trial court entered Findings No. 6 and 22, respectively:

> "A pretrial [settlement] conference was held before Commissioner Evans in the above-entitled matter on August 7, 2002. Substantial agreement was reached on the substantive issues in the case at the pretrial [settlement] conference. The primary reason the case was not settled was because of petitioner's request for attorney's fees."

> "Substantial agreement on the substantive issues was reached in this case in approximately June of 2002. Any attorney's fees expended by petitioner after that date should be substantially discounted."
>
> (R. at 297, 300)(A-3).

These findings are inconsistent with each other. The pretrial conference was on December 23, 2002. (R. at 232). The trial was held on January 14, 2003. While the trial court does not articulate its meaning for "just before this case went to trial," the plain language of the trial court's words implies that agreement on the transportation issue must have been reached on or near the date of trial, or January 14, 2003. But Findings 6 and 22 state that such agreement was reached much earlier, either in August or in June 2002. These two findings obviously conflict with Finding No. 8, and they are not reliable.

The correct finding is Finding No. 8, since it is entirely consistent with the prior statements made by the trial court at trial and at the subsequent Rule 59 hearing. During the trial, Judge Quinn made the following statements:

> "The position at the pretrial conference we had in this case . . . you weren't there, Mr. Russell, but Mr. Smith was there. . . . "He indicated that that was still an outstanding issue, the transportation."
>
> (R. at 620/Trial Tr. at 45)(A-1).
>
> "I'll take judicial notice of the fact that at the time of the pretrial conference in this case I was informed by both sides that the issue of who would be responsible for transportation was still an open issue."
>
> (R. at 620/Trial Tr. at 45-46)(A-1).
>
> "I was vague at that pretrial conference – the final pretrial conference of whether [the transportation issue] was still an open issue. I came away with the impression that it was still an open issue, and I've given

considerable thought to that issue since the time of the pretrial conference."

(R. at 620/Trial Tr. at 56)(A-1).

At the subsequent hearing on Ms. Colleli's Rule 59 Motion, Judge Quinn further stated the following:

"I agree with you that we did not have an unequivocal agreement at [the pretrial conference] that the [Mr. Colleli] would provide transportation."

(R. at 621/Hearing Tr. at 14)(A-2).

Each of the foregoing statements support the finding that the issue of transportation was not resolved until trial. Therefore, these statements clearly support Finding No. 8, and just as clearly they show that Findings 6 and 22 are erroneous.

However, even if Finding No. 22 were correct, the trial court entirely ignored the attorney fees up to that point in time. The trial court suggests in Finding 22 that those attorney fees that were incurred after June 2002 should be substantially reduced. But what about the fees prior to June? The trial court merely ignores those fees.

Th issue of fees prior to June 2002 was brought to the trial court's attention at trial. (R. at 620/Trial Tr. at 64)(A-1). Specifically, counsel for Ms. Colleli stated:

"I went through and calculated on the same affidavit here, and up through the end of May – the Guardian ad Litem's report came out June 5th. As of the end of May attorney's fees were $6,974 at that point in time."

(R. at 620/Trial Tr. at 64)(A-1).

So, even if the issue of transportation had been resolved in June 2002, the trial court completely discarded the fees incurred up to that point in time.

D. The trial court's findings are not supported by the record:

Although the trial court admitted at trial that it had not reviewed the affidavit of fees, it apparently did so before issuing its findings. The trial court's Finding No. 21 states:

> "The [trial court] has reviewed every entry on the Affidavit of Attorney's Fees submitted by petitioner. It appears that the litigation over attorney's fees has dominated the way this case was pursued. For example, the trial court has reviewed the deposition of Ralph Colleli. Out of an 80-page deposition, only eight pages related to the substantive issues in the case. The remaining time was spent exploring respondent's financial condition, which was only relevant to the issue of attorney's fees."
>
> (R. at 299-300)(*emphasis added*).

1. The trial court cites only one example from the billing records:

First, it is significant that the trial court provided only one example from 15 pages of detailed billing records. (R. at 267-85). Taking Mr. Colleli's deposition consisted of a single entry out of about 65 entries. *Id.* Further, the amount of time spent on that one activity represents less than 5% of the total time incurred, without counting the time at trial and post-trial matters. *Id.* Nonetheless, the trial court provides only this one example of what it considers as wasteful or unnecessary.

The trial court has obviously not provided sufficient evidence to support its statement ". . . that the litigation over attorney's fees has dominated the way this case was pursued."

What other evidence is there? The trial court presents no other evidence except pointing to the deposition of Mr. Colleli.

2. <u>The trial court never had a complete copy of the deposition and refused to acknowledge or admit its error or confusion:</u>

Second, and more troublesome, the trial court never had at its disposal a complete copy of the deposition. Rather, the trial court only had an "extracted copy" that had been prepared solely to impeach Mr. Colleli at trial. (R. at 620/Trial Tr. at 57)(A-1). The Record contains only two copies of Mr. Colleli's deposition: (1) an extract prepared for trial and located in the Record at 179-195[15] (A-10); and (2) a complete copy filed as Exhibit D to Ms. Colleli's Memorandum in Support of her Rule 59 Motion (R. at 337-58) (A-9). The deposition examined by the trial court is clearly missing 20 out of 84 pages. That is, nearly 25% of the pages of the deposition were missing from the version that the trial court examined.

An examination of the Record reveals that the trial court is clearly incorrect about the extracted copy of the deposition that it analyzed following the trial.[16] The Extract's cover

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[15] Although the extract was prepared in January 2003, just in time for trial, the indexer who organized and indexed the Record apparently filed all documents by date sequence. This process placed the extracted copy near the date of the deposition rather than the date of trial when such copy was inadvertently gathered up by the trial court.

[16] At trial, the trial court admitted that it only briefly looked through the Extract. (R. at 620/Trial Tr. at 57)(A-1). However, in its Findings the trial court states that "out of an 80-page deposition, only eight pages related to the substantive issues in the case," indicating a more thorough examination of the Extract. (R. at 300)(A-3).

page is found on page 179 of the Record. On the next page of the Record, page 180, one would expect to find the first page of the deposition. Instead, the Extract begins with page nine. This shows that the first eight pages of the deposition are missing, but the trial court failed to recognize such missing pages. Further, the Extract consists of 16 pages in the Record plus the cover page. Since there are four deposition pages for each page in the Record, simple math shows that the Extract contains only 64 (4 x 16) deposition pages. However, the last page of the Extract is numbered page 84. (R. at 195)(A-10). Inexplicably, the trial court refused to understand or to acknowledge that the document it examined is missing a quarter of its pages in the Record.

Therefore, the trial court's conclusion about the deposition is highly unreliable. Since the trial court's conclusion is based on a substantially incomplete document, it cannot be permitted to stand as a basis to deny Ms. Colleli's attorney fees.

3. <u>The trial court's analysis is flawed:</u>

Third, the trial court admitted that it only briefly "looked through" the deposition of Mr. Colleli (the Extracted version). (R. at 620/Trial Tr. at 57)(A-1). As a consequence, the trial court's conclusion about the content of Mr. Colleli's deposition lacks any hint of thoroughness. The trial court's treatment of the deposition is similar to its treatment of the attorney billing records where the trial admitted that it had not examined the records prior to stating the amount of fees to be awarded. (R. at 620/Trial Tr. at 58)(A-1).

Even a cursory examination of the Extract shows that the trial court is substantially incorrect. For example, the Extract contains 16 pages in the Record. Yet, the first question about Mr. Colleli's financial condition occurs on page 44 of the deposition, which is on the seventh physical page of the Extract. (R. at 186)(A-10). That means that at least 6-7 pages of the 16 pages in the Record were not devoted to Mr. Colleli's financial condition, assuming, incorrectly, that all remaining pages were devoted to Mr. Colleli's financial condition. But the trial court states in its Finding No. 21 that "out of an 80-page deposition, only eight pages related to the substantive issues in the case." (R. at 300)(A-3). The trial court then further states that:

> "The remaining time was spent exploring [Mr. Colleli's] financial condition, which was only relevant to the issue of attorney fees."
>
> (R. at 300)(A-3)

The trial court implies that 72 out of 80 pages, or 90% of the deposition, related solely to Mr. Colleli's financial condition. If the trial court were correct, then out of the 16 pages it had in its possession, all but 1.6 pages would have been related to the financial condition of Mr. Colleli. But such a conclusion is obviously not true, since the first question raised about Mr. Colleli's financial condition is on page 44 of the deposition, or on the seventh page of the extracted copy in the Record. (R. at 186)(A-10). So, even taking the "extracted copy" as being a correct copy of the deposition, the trial court's analysis is clearly erroneous.

In stark contrast, Ms. Colleli, in her Rule 59 Motion, provided a more thorough and detailed analysis of Mr. Colleli's complete deposition: (R. at 312).

ANALYSIS OF DEPOSITION

Deposition Pages	Number of Pages	Percent of Total Pages	Subject Matter
17-44, 77-83	35	42%	Visitation and transportation issues
45-70, 74-76	29	35%	Ownership of and income from Respondent's owned business
1-12	12	14%	Introduction and general background, including marriage and places lived
13-16	4	5%	Nevada orders and who filed them
71-73	3	4%	Veracity issues as they relate to Respondent's credibility
TOTALS	83	100%	

The foregoing analysis shows a far different result than that reached by the trial court after its brief look through an extract of the deposition. The dominant issue was visitation and transportation. Slightly more than 1/3 of the deposition was focused on Mr. Colleli's income and assets. Had Mr. Colleli been more forthcoming, non-evasive, and truthful, that 1/3 would have been an even smaller fraction. Mr. Colleli repeatedly lied throughout his deposition and often feigned a lack of knowledge. *See, e.g.*, (R. at 348-51, 353-55) (A-9). Accordingly, the trial court's conclusion is clearly erroneous.

E. The trial court improperly discounted the amount of time expended to discover Mr. Colleli's financial condition:

While the Statutes form the basis for an award of attorney fees, such fees are only awarded after consideration of the three-pronged analysis required by *Muir*. Although it was clear at the outset that Ms. Colleli needed assistance with her fees, she had the burden

of showing that Mr. Colleli had the means to pay her fees. After all, the Financial Declaration that he had filed showed that he had no means to pay Ms. Colleli's fees. (R. at 203-04)(A-11). His Declaration shows no salary or wages. *Id.* at 203. It shows only that he receives $3,800 from "repayment of investment." *Id.* at 204. The Declaration also shows that his living expenses are $3,842. *Id.* at 208. In effect, his expenses exceed his "income." Based solely on his Financial Declaration, Mr. Colleli had no ability to pay Ms. Colleli's attorney fees.

The trial court repeatedly stated and implied that attorney fees incurred to discover Mr. Colleli's financial condition were unreasonable, as though such fees are unreasonable as a matter of law. (R. at 299-300); (R. at 620/Trial Tr. at 57)(A-1). The trial court cites no other example nor any other legal activity except for the deposition of Mr. Colleli.

The trial court first acknowledged the three factors set forth in *Muir*. (R. at 620/Trial Tr. at 4)(A-1); (R. at 300)(A-3). After testimony from Ms. Colleli and Mr. Colleli, the trial court next found that Ms. Colleli had a need for assistance with her fees and that Mr. Colleli had the financial means to pay her fees. (R. at 620/Trial Tr. at 57-58)(A-1). But for Mr. Colleli's testimony at trial, the trial court had no other evidence on which to evaluate Mr. Colleli's financial condition, except for his Financial Declaration. Therefore, without Mr. Colleli's testimony at trial, the trial court could not possibly have found that Mr. Colleli had the financial means to pay Ms. Colleli's fees.

Mr. Colleli is self-employed. (R. at 206, 298)(A-11 and A-3 respectively). His business tax returns show a loss. (R. at 212). His personal tax returns reflect his business

loss. (R. at 620/Trial Tr. at 28-29, 34)(A-1). Moreover, Mr. Colleli stated in his deposition and again at trial that he made little or nothing from his business. (R. at 620/Trial Tr. at 34)(A-1). Likewise, Mr. Colleli's Financial Declaration shows no income from salary or wages and that his expenses exceed his "income." (R. at 203-08) (A-11). Based on this evidence, a trier of fact could not reasonably conclude that Mr. Colleli had the financial means to pay Ms. Colleli's attorney fees.

Formal discovery and detailed analyses were the only tools available to uncover Mr. Colleli's true financial condition. These discovery steps included propounding interrogatories, requesting and analyzing Mr. Colleli's financial records, taking the deposition of Mr. Colleli, and with the aid of his accountant examining his tax returns.

The trial court was able to find sufficient evidence to conclude that Mr. Colleli had sufficient financial means to pay Ms. Colleli's attorney fees, and such finding was possible only because of the testimony of Mr. Colleli at trial. (R. at 298-99)(A-3).

Had Ms. Colleli's counsel merely forged ahead to trial on the sole issue of transportation, as the trial court has suggested, the trial court would have been bound by the factors set forth in *Muir*. Without Mr. Colleli's testimony at trial, the trial court would have had no choice but to deny an award of attorney fees for Ms. Colleli, since there would have been no evidence to support a contrary result. Accordingly, the deposition of Mr. Colleli was essential to the determination that he had the means to pay Ms. Colleli's attorney fees, despite Mr. Colleli's Financial Declaration.

F. It was error for the trial court to reduce fees based on the number and narrowness of the issues.

The trial court stated that the number and narrowness of the issues should have required fewer attorney fees. (R. at 620/Trial Tr. at 56, 57, 70)(A-1). The trial court may be correct had Mr. Colleli not been intransigent on the issue of transportation. The trial court's reasoning is analogous to the common misapprehension that the amount in controversy should dictate the amount of fees. In *Dixie State Bank*, the Utah Supreme Court stated the following:

> In addition, although the amount in controversy can be a factor in determining a reasonable fee, care should be used in putting much reliance on this factor. It is a simple fact in a lawyer's life that it takes about the same amount of time to collect a note in the amount of $1,000 as it takes to collect a note for $100,000. As stated in *Cabrera*:
>
> > The total amount of the attorneys fees awarded in this case cannot be said to be unreasonable just because it is greater than the amount recovered on the contract. The amount of the damages awarded in a case does not place a necessary limit on the amount of attorneys fees that can be awarded.
>
> *Dixie State Bank v. Bracken*, 764 P.2d 985, 990 (Utah 1988); *American Vending Servs. v. Morse*, 881 P.2d 917 (Utah Ct. App. 1994).

In the instant case, the transportation issue was singular and narrow. However, Mr. Colleli took extraordinary steps to avoid responsibility for transportation. At mediation, he refused to accept responsibility for transportation. (R. at 620/Trial Tr. at 14-44)(A-1). He then filed a Rule 60(b) Motion to remove the provision in the Temporary Order that required him to provide transportation. (R. at 124). After the

Guardian ad Litem's Report, Mr. Colleli filed his "Proposed Settlement" in which he continued to insist that Ms. Colleli be responsible for transportation. (R. at 209)(A-11). At the pretrial settlement conference with the Commissioner and at the pretrial conference with the trial court, Mr. Colleli again refused to accept responsibility for transportation. (R. at 620/Trial Tr. 45-46, 52-53)(A-1).

Throughout the entire proceedings in the trial court, it was Mr. Colleli who caused the attorney fees to be greater than they otherwise might have been. There was nothing more that Ms. Colleli could have done to shorten the proceedings below.

G. The trial court's belief that the transportation issue could have been resolved amicably and more quickly is unsupported by the record and is contrary to the evidence.

The trial court stated numerous times that the proceedings below could or should have been resolved amicably or through compromise. *See* (R. at 620/Trial Tr. at 58-59)(A-1); (R. at 621/Hearing Tr. at 5)(A-2).

Further, the trial court's Finding No. 19 states:

> "Although [Ms. Colleli] ultimately prevailed on the substantive issues on this case, the same result could have been reached by conducting settlement discussions early in the case before the amount of attorney's fees became a substantial impediment to settlement."
>
> (R. at 299 ¶19)(*emphasis added*).

The trial court implies that not enough effort was made by Ms. Colleli to more quickly resolve the dispute over transportation. But the trial court failed to review the steps taken by the parties prior to trial.

At the conclusion of the trial, the trial court exhibited its lack of knowledge:

> "In fact, if the parties had gotten together, it very well should – could have been resolved early on. I don't know whose responsibility the [sic] way that happened."
>
> (R. at 620/Trial Tr. at 58)(A-1).

The trial court seems to have overlooked entirely the fact that the parties attended mediation very early in the proceedings. (R. at 115). After mediation in February 2002, however, Mr. Colleli continued to insist that Ms. Colleli be responsible for transportation. *Id.* Further, in March 2002, he filed a Rule 60(b) to remove from the Temporary Order his obligation to provide transportation. (R. at 124). At his deposition in May 2002, he continued to deny his responsibility for transportation. (R. at 186)(A-10). And in his proposed settlement filed on June 12, 2002, he still proposed that Ms. Colleli provide transportation. (R. at 209)(A-11).

What more could Ms. Colleli have done? There was no compromise offered by Mr. Colleli nor was any compromise possible. Either he accepted responsibility for transportation or he did not. Until the day of trial, Mr. Colleli steadfastly clung to the position that transportation was the responsibility of Ms. Colleli.

The trial court cites no actions taken by Ms. Colleli that impeded an amicable resolution of the issue of transportation, nor did the trial court suggest any possible actions that she might have taken to shorten or speed up the proceedings in the trial court.

In essence, the issue of transportation was not an issue subject to compromise. It was not possible for Ms. Colleli to provide transportation some of the time or part way. Either

Mr. Colleli was responsible for transportation or he was not. There was and is no middle ground. Ms. Colleli has no means to provide transportation.

By the time of the pre-trial settlement conference with the Commissioner, Ms. Colleli's attorney fees were $7,843. At that conference, Mr. Colleli offered a paltry $900. (R. at 620/Trial Tr. at 67)(A-1). He maintained that offer through his Offer of Judgment filed on December 13, 2002. (R. at 230).[17] Mr. Colleli offered no compromise. Compared with her actual fees of $7,843, his $900 offer was completely unreasonable. It is not clear if the trial court is suggesting that Ms. Colleli should have compromised her fees of $7,843 down to $900 or down to $3,000. The only way the dispute over fees could have settled was for Ms. Colleli to accept $900. That is unrealistic and inequitable.

Although settlement discussions are normally inadmissible, Ms. Collei did offer to resolve the transportation issue and the attorney fees issue at the settlement conference with the Commissioner. While the transportation issue could not be compromised, the attorney fees could. But Mr. Colleli remained as intransigent about not paying more than $900 as he was about transportation. It appeared throughout the settlement conference that Mr. Colleli would not agree on the transportation issue as long as he had to pay more than $900 in attorney fees. He inextricably intertwined the two issues.

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[17] The Offer of Judgment was received shortly after December 13, 2002, and the pre-trial conference was set for and held on December 23, 2002. Since there was no resolution of any issues at the pre-trial conference, Ms. Colleli made a counteroffer on December 24, 2002. The amount of $7,000 was considerably greater than the $900 offered for attorney fees, but far less than the actual fees incurred at that point. (R. at 363-64). No further response or offer was ever received from Mr. Colleli.

H. The trial court's reduction of fees is contrary to law and public policy.

The trial court suggests that there is something nefarious or unsavory about incurring fees to obtain an award of fees. Such a suggestion is contrary to law and public policy. In domestic cases like the proceedings below, the Legislature expressly provided for an award of attorney fees. *See* § 30-3-3(1) and 5(6), *U.C.A.* (2002). (collectively the "Statutes"). In effect, Utah's divorce laws are intended to deter bad behavior and to make whole a prevailing party. *See id.*

When a court arbitrarily sets a fee that is only a small fraction of the actual fees, it undermines the ability of disadvantaged individuals to access the courts and it fosters disrespect for our judicial system. It also provides no disincentive for bad-acting parties. In the instant case, Mr. Colleli knew or should have known that his intransigence could very well come back to haunt him. He took that risk. He should not now be rewarded with only a small fraction of the amount he could have been assessed.

Further, Utah's appellate courts have declared that "fees for fees" is permissible. In *Salmon v. Davis County*, 916 P.2d 890 (Utah 1996), the Utah Supreme Court addressed the issue of "fees for fees."

> Although this court has not directly addressed the issue of whether fees incurred in recovering fees allowed under a statute should also be awarded pursuant to the statute, we agree with the rationale articulated in *American Federation of Government Employees, AFL-CIO, Local 3882 v. Federal Labor Relations Authority*, 301 U.S. App. D.C. 293, 994 F.2d 20 (D.C. Cir. 1993):
>
> > Federal courts have repeatedly recognized that the unavailability of "fees for fees" could render fee-shifting

> provisions impotent, thereby reducing the effectiveness of the underlying statutes. . . . An award of "fees for fees" is not merely a remote descendant of the underlying action from which it derives. Rather, it is an integral aspect of the statutory scheme on which the underlying claim is based.
>
> 994 F.2d at 22; *see also Commissioner, INS v. Jean*, 496 U.S. 154, 163-64, 110 L. Ed. 2d 134, 110 S. Ct. 2316 (1990); *Prandini v. National Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978); *Souza v. Southworth*, 564 F.2d 609, 614 (1st Cir. 1977). This rationale is {916 P.2d 896} consistent with our prior case law awarding attorney fees for appeals where attorney fees are initially authorized by statute. *See First Southwestern Financial Servs.*, 875 P.2d at 556.
>
> Analogously, we have recognized that a contractual obligation to pay attorney fees incurred in enforcing a contract should also include fees incurred on appeal. In *Management Services v. Development Associates*, 617 P.2d 406, 408-09 (Utah 1980), we stated that the purpose of an attorney fees provision is to indemnify the prevailing party against the necessity of paying attorney fees and thereby enable him to recover the full amount of the obligation. *Id.* at 409. In accordance with this purpose, we concluded that "a provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract." *Id.* Similarly, the court of appeals recently ruled that the prevailing party in a dispute over a contractual attorney fees provision was entitled, not only to attorney fees on appeal, but also to the fees it incurred establishing the reasonableness of the fees for which it was entitled to be indemnified. *James Constructors v. Salt Lake City*, 888 P.2d 665, 674 (Utah Ct. App. 1994).

If the fee-shifting provisions of the Statutes[18] are to have their intended meaning, then Ms. Colleli is entitled to her "actual" fees, including those fees incurred to show that

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[18] § 30-3-3(1) and 5(6), *U.C.A.* (2002)

Mr. Colleli had sufficient financial means to pay her attorney fees. § 30-3-5(6), *U.C.A.* (". . . the court may award to the prevailing party costs, including actual attorney fees and court costs incurred by the prevailing party . . .")(*emphasis added*).

The trial court reduced the fee award based on its incorrect perception that the proceedings below were mainly focused on Mr. Colleli's financial condition. It cited no other activities nor any other factors that could be a basis for reducing Ms. Colleli's fees. The trial court's reduction of fees is both plain error and clearly erroneous. This Court should remand with instructions to the trial court to award all of Ms. Colleli's attorney fees consistent with this Court's opinion, including those fees incurred at trial, during post-trial proceedings and those incurred on appeal, with the only exception being particularly itemized activities that are deemed unreasonable, but not including, however, discovery activities to show Mr. Colleli's financial condition.

Based on all the evidence, the trial court's findings are not supported by the record, are analytically flawed, and are contrary to Utah Law and public policy.

ISSUE NO. 2:

> *Whether the trial court erred in concluding that a Nevada order that changed the child support obligation of the parties was ambiguous on the question of whether the order also eliminated a previous award of alimony in favor of Ms. Colleli.*

On February 6, 2003, the trial court entered an order denying Ms. Colleli's Motion for Order to Show Cause for Mr. Colleli's failure to pay alimony. (R. at 113-14)(A-5). In its order, the trial court stated:

> "The foreign [May Order] is ambiguous as to an award of alimony after May 1999. It appears that the Nevada Court did not intend alimony payments to continue beyond that date."
>
> (R. at 114)(A-5).

The trial court's ruling referred to one of several Nevada orders filed with the Third District Court. It is instructive to first review each of the Nevada documents filed with the trial court. The original Decree, incorporated within the Nevada Court's *Findings of Fact, Conclusions of Law, and Decree of Divorce*, dated October 3, 1997, provides monthly alimony for Ms. Colleli in the amount of $450. (R. 74-78)(A-12). On January 7, 1999, the Parties' *Stipulation to Modify Decree of Divorce* was entered in the Nevada Court. (R. at 70-71)(A-13). The Stipulation modified the amount and manner in which alimony was to be calculated. The relevant part of the Stipulation is:

> Alimony shall be reduced to a sum equivalent to the difference between $600.00 and the amount of child support and payment on arrearages ordered, so that [Mr. Colleli] pays by wage withholding the amount of child support and arrearages ordered and pays to [Ms. Collei] directly a sum to make the total monthly amount equal to $600.00, the difference to be deemed alimony. Arrearages previously calculated and adjudged should be revised to reflect only child supply. It is agreed that all arrearages for spousal support are hereby waived up to and including the month of November, 1998.
>
> (R. at 70)(A-13).

On February 9, 1999, the Stipulation was incorporated by the Nevada Court into an *Order Modifying Decree of Divorce* (the "February Order"). (R. at 67-68)(A-14). The relevant part of the February Order is:

> [Mr. Colleli] shall pay to [Ms. Colleli] the sum of $600.00 per month, of which all sums in excess of the statutory child support and any payment on arrearages shall be deemed alimony. At this time, ongoing child support is $482.00, payment on arrearages is $50.00, and alimony is $68.00.
>
> (R. at 67-68)(A-14).

Then on May 21, 1999, the Nevada Court entered a second *Order Modifying Decree of Divorce (Child Custody)*. (the "May Order"). This second modification reflects the change in custody of the two minor children from Ms. Colleli to Mr. Colleli. Accordingly, child support obligations were changed from Mr. Colleli to Ms. Colleli. The relevant part of the May Order is:

> [Ms. Colleli] shall pay to [Mr. Colleli] a sum equivalent to 25% of her gross monthly income, but in any event not less than $100 per child, as and for support of the minor children, until the children reach the age of 18 or are otherwise emancipated. The sum of $100 per month per child is the appropriate sum for child support at this time.
>
> (R. at 2-4)(A-15).

The May Order speaks for itself, but Ms. Colleli contends that it is not ambiguous and contains no intention to eliminate alimony. The trial court's interpretation of a prior judicial order constitutes a conclusion of law. *See Billings v. Union Bankers Ins. Co.*, 918 P.2d 461, 464 (Utah 1996). And whether a writing is ambiguous or not is a conclusion of law. *See Jeffs v. Stubbs*, 970 P.2d 1234, 1251 (Utah 1998).

The May Order clearly changes the child support obligations of the parties. While the child support obligation was changed from Mr. Colleli to Ms. Colleli, the May Order

is entirely silent on the issue of alimony. The trial court apparently believed that if the child support obligation was transferred from Mr. Colleli to Ms. Colleli, alimony for Ms. Colleli was eliminated. But there is not a hint of such intent in the May Order. Further, the caption on the May Order identifies the nature of its modification as "Child Custody." (R. at 1)(A-15).

There is no basis in law to support a linkage between a need for child support and a need for alimony. They are two separate issues. Child support is intended for the benefit of minor children. Alimony is intended for the benefit of a former spouse. The May Order is void of any reference to Ms. Colleli's needs. Although the custody of the children was transferred from Ms. Colleli to Mr. Colleli and along with that transfer the child support obligation was transferred, the need for alimony was not changed, or at least there is no evidence that Ms. Colleli's need for alimony changed. The plain language of the May Order suggests no intent to change the obligation for alimony.

The trial court apparently reasoned that the Nevada court mistakenly failed to deal with the issue of alimony but that had the Nevada court done so, it would have eliminated alimony. That reasoning reads far too much into the intent of the Nevada court. Without more, the trial court's finding of ambiguity is without merit.

The trial court was in error and this Court should reverse the trial court's interpretation of the May Order. The effect of such reversal will permit Ms. Colleli to renew her Motion for Order to Show Cause for unpaid alimony.

ISSUE NO. 3:

> *Whether the trial court erred in concluding as a matter of law that Ms. Colleli's failure to previously make a request for alimony now bars her from seeking any reimbursement for such unpaid alimony.*

After finding ambiguity in the May Order,[19] the trial court applied the doctrine of laches and denied Ms. Colleli's Motion for Order to Show Cause. (R. at 113-14)(A-5). In its order, the trial court stated:

> "Given the ambiguity of the [May Order], and given [Ms. Colleli's] failure to make any request for alimony since May 1999, the court finds that [Ms. Colleli] is estopped from seeking any reimbursement for alimony and therefore denies her motion."
>
> (R. at 114)(A-5).

The issue of ambiguity was presented under Issue No. 2. The issue of estoppel is now presented.

The trial court reasoned that Ms. Colleli is estopped from seeking to collect alimony because she failed to make a claim for alimony during the two and one-half years since the entry of the February Order. Such reasoning is contrary to Utah Law.

In *Adams v. Adams*, 593 P.2d 147 (Utah 1979), the Utah Supreme Court found that a wife was not estopped to assert her claim for unpaid alimony merely because she had been silent and did not claim it for a period of five and one-half years, where she had no duty to speak, had not misled her husband in any way, and the husband had not changed his position to his detriment in reliance on any representations by the wife. *Id.* at 148.

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[19] See Issue No. 2.

In the instant case, Ms. Colleli no longer resided in the State of Nevada at the time Mr. Colleli filed his motion to modify and when the February Order was entered.[20] She suffered and still suffers from Multiple Sclerosis and had no reasonable means to retain legal counsel to represent her. Moreover, since the entry of the February Order, Petitioner has not been employed and has had no financial means to assert her claim for alimony. The trial court's conclusion that Petitioner is now estopped from collecting unpaid alimony, merely on the basis that she made no prior claim, is without any legal support under Utah Law.

Accordingly, the trial court erred, and this court should reverse the trial court's order and permit Ms. Colleli to pursue her claim for unpaid alimony.

ISSUE NO. 4:

> *Whether the trial court erred when it concluded that the provisions of § 78-45-7.15(8), U.C.A., are not applicable to a Nevada decree of divorce, even though Mr. Colleli first sought jurisdiction in the State of Utah by registering the foreign decree and then sought to enforce the decree against Ms. Colleli for one half of the medical bills paid by him.*

Divorced parents generally share equally the medical bills paid for their minor children. However, § 78-45-7.15(8), *U.C.A.*, mandates that the party seeking reimbursement for such medical bills provide timely written verification to the other party:

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[20] The February Order was the order that changed the formula for calculating the amount of alimony for Ms. Colleli.

> A parent who incurs medical expenses shall provide written verification of the cost and payment of medical expenses to the other parent within 30 days of payment.
>
> § 78-45-7.15(8), *U.C.A.* (*emphasis added*).

The penalty for a party who fails to timely provide such written verification may be a denial of reimbursement:

> In addition to any other sanctions provided by the court, a parent incurring medical expenses may be denied the right to receive credit for the expenses or to recover the other parent's share of the expenses if that parent fails to comply with Subsections (7) and (8).
>
> § 78-45-7.15(9), *U.C.A.*

In the instant case, Ms. Colleli attempted to use § 78-45-7.15(8) and (9), *U.C.A.*, in her defense against Mr. Colleli's request for reimbursement of one-half of the medical bills he allegedly incurred from 1999 to February 2003. However, the Commissioner refused to consider § 78-45-7.15, *U.C.A.*, as a defense. Subsequently, the trial court ruled that since the Decree was void of the notice or reporting requirements imposed by § 78-45-7.15(8), *U.C.A.*, the penalty available in § 78-45-7.15(9), *U.C.A.*, is not available to Ms. Colleli. (R. at 587-88)(A-7).[21] The trial court then approved the recommendation of the Commissioner. *Id.*

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[21] At hearing with the Commissioner, the Commissioner expressly denied the use of § 78-45-7.15(8) and (9), *U.C.A.*, as a defense. After a hearing in the trial court, the actual order entered by the trial court transformed the wording into giving "full faith and credit to the Nevada Decree" and approving the Commissioner's refusal to grant Mr. Colleli's motion for reimbursement without consideration of § 78-45-7.15(8), *U.C.A.*

The trial court's choice of law constitutes a conclusion of law. *See Wilde v. Wilde*, 969 P.2d 438, 442 (Utah Ct. App. 1998); *Shaw v. Layton Constr. Co.*, 872 P.2d 1059, 1061 (Utah Ct. App. 1994). Accordingly, this Court should review this issue with no deference to the trial court. *See Orton v. Carter*, 970 P.2d 1254, 1256 (Utah 1998); *Rackley v. Fairview Care Ctrs., Inc.*, 970 P.2d 277, 280 (Utah Ct. App. 1998).

In deciding this issue, this Court should note that Mr. Colleli first sought the protection of Utah's courts by registering the Nevada Order in Utah. Mr. Colleli invoked the jurisdiction of Utah's courts and Utah's laws, including Utah's § 78-45f-100, et seq, *U.C.A.*, and known as the "Utah Interstate Family Support Act." ("UIFSA").

Two simple examples illustrate the inconsistency of the trial court: (1) the schedule for parenting time; and (2) the award of attorney fees. The trial court did not look to Nevada Law to establish a schedule for parenting time nor did the trial court look to Nevada Law in awarding attorney fees. Instead, the trial court looked only to Utah Law. Why then would the trial court feel compelled to avoid Utah Law in deciding whether Mr. Colleli had to comply with the requirements imposed by § 78-45-7.15, *U.C.A.*? The trial court's position is inconsistent and illogical.

Moreover, UIFSA (in particular, § 78-45f-100, et seq, *U.C.A.*)(A-16)) requires the trial court to apply Utah Law. Medical bills constitute a "support order" under UIFSA. § 78-45f-101(22), *U.C.A.* (A-16). The trial court is a "responding tribunal," since Utah is the "responding state." § 78-45f-101(16)-(17), -102, *U.C.A.* Therefore, § 78-45f-303, *U.C.A.*, requires the trial court to "apply the procedural and substantive law" of Utah:

> Except as otherwise provided by this chapter, a responding tribunal of this state shall:
>
> (1) apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings; and
>
> (2) determine the duty of support and the amount payable in accordance with the law and support guidelines of this state.

This Court should reverse the trial court on its choice of law and remand for a determination of whether Mr. Colleli should be denied reimbursement for Ms. Colleli's share of medical bills for the minor children.

CONCLUSIONS and RELIEF SOUGHT

Issue No. 1: The sufficiency of the trial court's findings to support its reduction of attorney fees is inadequate. First, the trial court cites only a single entry in billing records that contain 15 pages. Second, the trial court heavily relies on its "extracted copy" of Mr. Colleli's deposition, which was missing 25% of its pages. Further, the trial court erred when it wrongly suggested that fees incurred in discovery of Mr. Colleli's true financial condition should not be awarded. The trial court's reduction of fees is contrary to Utah Law and against public policy. On Issue No. 1, Ms. Colleli requests this Court to remand to the trial court for a proper determination of attorney fees, including all fees incurred during trial, post-trial, on appeal, and during post-appeal activities in support of proving fees.

Issue No. 2: The trial court erred when (a) it found the May Nevada Order to be ambiguous; and (b) linked a change in child support with a need for alimony. First, the May Order is not ambiguous and it is entirely silent on the issue of alimony. Second, child support and alimony are two separate issues. On Issue No. 2, Ms. Colleli requests this Court to reverse the trial court and permit her to pursue collection of unpaid alimony.

Issue No. 3: The trial court erred in denying Ms. Colleli's request for unpaid alimony when it ruled that she was estopped from seeking such alimony. This is contrary to established law in Utah. On Issue No. 3, Ms. Colleli requests this Court to reverse the trial court and permit her to pursue collection of unpaid alimony.

Issue No. 4: The trial court erred when it ruled that Utah's domestic laws do not apply to a Nevada Decree, particularly when Mr. Colleli registered the May Order with the trial court. UIFSA requires the trial court to apply Utah Law. On Issue No. 4, Ms. Colleli requests this Court to reverse the trial court and permit her to renew her objection to Mr. Colleli's request for reimbursement for medical bills allegedly paid by him from 1999 through February 2003.

Finally, this Court should also award Ms. Colleli her attorney fees and costs on appeal.

DATED this 4th day of February 2004.

Michael A. Jensen (7231)
Counsel for Appellant, Ms. Colleli

CERTIFICATE OF SERVICE

Appellate Court No. 20020177-CA

DAWN D. COLLELI,

Appellant/Petitioner,

vs.

RALPH D. COLLELI,

Appellee/Respondent.

I, Michael A. Jensen, hereby certify that on this day that I served the foregoing **APPELLANT'S BRIEF** by personally DELIVERING **two copies** thereof to:

Steven C. Russell
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DATED this 4th day of February 2004.

Michael A. Jensen
Attorney for Appellant, Dawn Colleli

ADDENDUM INDEX